IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

Nos. 16 & 22

JERRY DOUGLAS MEMPA,

Petitioner,

v.

B. J. RHAY, Superintendent, Washington State Penitentiary,

Respondent.

WILLIAM EARL WALKLING,

Petitioner,

v.

B. J. RHAY, Superintendent, Washington State Penitentiary,

Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF OF PETITIONERS

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Opinions Below

A. *Mempa* v. *Rhay:*

The majority and dissenting opinions of the Washington State Supreme Court are reported in 68 Wn.2d 882, 416

P.2d 104 (1966). They are printed in the Record at pages 40-59. All references to the *Mempa* record are herein denoted as "M.R."

B. *Walkling* v. *Rhay:*

An opinion was not rendered in *Walkling* v. *Rhay*. The order of the Washington State Supreme Court is not reported, but is printed in the Record at pages 19-20. All references to the *Walkling* record are herein denoted as "W.R."

Jurisdiction

A. *Mempa* v. *Rhay:*

The opinion of the Court below was filed on June 23, 1966 (M.R. 40). In Washington, no separate judgment is entered. The petition for certiorari was filed on August 8, 1966, and certiorari was granted on February 13, 1967 (M.R. 62). The jurisdiction of this Court is invoked under 28 U.S.C., § 1257(3), because rights are claimed under the Constitution of the United States.

B. *Walkling* v. *Rhay:*

The order of the Court below was filed on October 18, 1966 (W.R. 19). The petition for certiorari was filed on October 31, 1966, and certiorari was granted on February 13, 1967 (W.R. 21). The jurisdiction of this Court is invoked under 28 U.S.C., § 1257(3), because rights are claimed under the Constitution of the United States.

Constitutional Provisions and Statutes Involved

The constitutional provisions involved are the Sixth Amendment,

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence,"

and Section 1 of the Fourteenth Amendment of the Constitution of the United States:

> " . . . nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The statutory provisions involved are Chapter 155, § 1, p. 459, Laws of Washington, 1915, as amended by Chapter 64, § 1, p. 131, Laws of Washington, 1919 (RCW 9.54.020), Chapter 227, Sections 3, 4, 5 and 7, p. 890-92, Laws of Washington, 1957 (RCW 9.95.200, 9.95.210, 9.95.220 and 9.95.240) and Section 1057, Laws of Washington, 1881 (RCW 10.40.175). They are reproduced in Appendix A of this brief.

Questions Presented

1. Does the Fourteenth Amendment confer a right to counsel during a state court probation revocation proceeding?

2. Does the Fourteenth Amendment confer a right to counsel at the sentencing and judgment stage of a state court criminal proceeding?

3. If such a right to counsel exists, and in the absence of waiver, must counsel be appointed for a defendant unable to employ counsel?

Statement of the Cases

A. *Mempa* v. *Rhay:*

Petitioner Jerry Douglas Mempa, who was then under 18 years of age, was apprehended by Spokane police on April 28, 1959, on the belief that he had participated in the taking of one or more automobiles without the permission of the owner (M.R. 13). He was placed in the custody of the Spokane Juvenile Detention Home (M.R. 13). On April 29, 1959, he escaped and, during his absence on escape—on May 1, 1959, the juvenile court entered an order relinquishing exclusive jurisdiction over petitioner (M.R. 13). The case was transferred to the prosecuting attorney of Spokane County, Washington, for prosecution under the provisions of the Criminal Code (M.R. 13). On May 18, 1959, the petitioner surrendered to the Sheriff of Spokane County, at which time he was accompanied by his stepfather (M.R. 13).

On May 26, 1959, an information (M.R. 8) was filed in the Superior Court for Spokane County, charging petitioner Mempa with the crime of "violating section 9.54.020 of the Revised Code of Washington (RCW) commonly known as 'Joy Riding,'" in that petitioner did "without the permission of the owner or person entitled to possession thereof, intentionally take and drive away a motor vehicle, to wit: a 1956 Chevrolet automobile, . . . "

Counsel was thereafter appointed (M.R. 13) to represent petitioner, and on June 17, 1959 (M.R. 9) he was arraigned

before the Spokane County Superior Court. He entered a plea of guilty to the "joy riding" charge (M.R. 10) and an Order of Probation (M.R. 20) was thereupon entered, placing him on probation for two years, and providing for thirty days confinement as a condition of probation. The imposition of sentence was deferred pursuant to the provisions of RCW 9.95.200 and 9.95.210, and petitioner was instructed to remain under the supervision of the State Parole Office.

Petitioner Mempa was seventeen years old when he pleaded guilty and was placed on probation. He had not completed the eighth grade, and since 1956—age 14—he had progressed through a variety of juvenile and mental institutions within the State of Washington, with a conflict of opinion between two of the facilities as to whether he was a psychopathic delinquent (M.R. 10-11). His first appearance in Superior Court arose out of the above-described offense (M.R. 11, 58).

Approximately four months after petitioner was placed on probation, the Spokane County Prosecutor's office moved to have his protection revoked on the ground that he had been involved in a burglary on September 15, 1959 (M.R. 22-23). Accordingly a hearing was held in the Spokane County Superior Court on October 23, 1959 (M.R. 24-28). Petitioner, still seventeen years old, was accompanied to the hearing by his stepfather (M.R. 24). He was not represented by counsel and the court made no inquiry concerning the appointed counsel who represented petitioner four months earlier. Petitioner was not advised of a right to counsel, and he was not asked if he wished to be represented by counsel (M.R. 24-27; 38). The Court asked petitioner if he had been involved in the alleged burglary, and

petitioner answered in the affirmative (M.R. 25). Following petitioner's admission, the Court heard testimony from William D. Weaver, a parole and probation officer, and the crucial portion of the proceedings went as follows (M.R. 26):

> "THE COURT: Just make it short and sweet. You made the report in this connection and you state that the boy denied breaking into the place out there, wherever it was?
>
> "A. That is correct.
>
> "THE COURT: And he did so deny it?
>
> "A. Yes.
>
> "THE COURT: All right, that's all. Hand up the order revoking the probation. I'm signing the order revoking the probation that I previously granted you. Now, stand up, Jerry. Probation having been revoked, it is the further judgment of the Court that you be confined in the Washington State Reformatory for a maximum period of ten (10) years."

Without affording petitioner an opportunity to cross-examine the witness or state anything in his own behalf, the court entered an Order revoking probation (M.R. 23). Judgment was entered upon the previous plea of guilty to "joy riding" and petitioner was sentenced to imprisonment for a maximum term of ten years (M.R. 33-34). Petitioner was not advised of his right to appeal, and no appeal was taken.

In 1965, petitioner Mempa filed a pro se petition for writ of habeas corpus (M.R. 1-4) with the Washington State Supreme Court alleging that the judgment and sentence

of October 23, 1959,[1] was void because he had not been represented by counsel during the probation revocation hearing, nor at the time of sentencing. The petition for writ of habeas corpus relied upon the Washington State Constitution and the Sixth Amendment to the Constitution of the United States.[2]

A comprehensive opinion was delivered by the *en banc* Washington State Supreme Court on June 23, 1966, denying the application for habeas corpus by a vote of six to three (M.R. 40-59).

The majority opinion states the issue in this fashion (M.R. 40-41):

> "The basis of this petition for a writ of habeas corpus may be concisely described as follows: Jerry D. Mempa was not represented by counsel at the peremptory hearing in the Spokane Superior Court when (a) his probation status was revoked, (b) the deferral of sentence was vacated, and (c) its imposition took effect forthwith. Thus, the problem presented to us for decision is whether probationer Mempa was entitled to counsel as a matter of constitutional right in relation to any one or all of the foregoing aspects of administration of the state probation system."

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[1] The petition for habeas corpus says judgment and sentence were entered on June 17, 1959. This is incorrect, as the record demonstrates (M.R. 34). Petitioner was pro se when the petition was filed, and he was mistaken about the dates.

[2] Petitioner, being indigent, was not represented during the oral "argument" before the Washington State Supreme Court. One Assistant Attorney General "argued" both for the petitioner *and* for the respondent.

The Court's opinion is well summarized in this excerpt (M.R. 47-48):

> "While probation is a modern innovation with much constructive potential in terms of the possible rehabilitation of criminal offenders, probation status, or the granting of it by the courts, is a matter of grace or privilege to be granted solely in the discretion of the courts. . . . We have previously held that there are no constitutional rights respecting the acquisition of probation status. And it is furthermore our reasoning that there are no constitutional rights involved in the termination or revocation of probationary status, or in respect to the concomitant operations of the superior courts involving imposition of either (1) suspended or (2) deferred sentences. The function involved, in terms of definitive action, is essentially quasi-administrative or plenary in nature. The operations are essentially no different from those performed administratively by the State Board of Prison Terms and Paroles or by the prison authorities in administering other phases of penal administration in the state of Washington."

The Court overruled prior cases conferring a right to counsel at the *imposition of sentence* following probation revocation (M.R. 47), specifically rejected the authority of *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), and *Escoe* v. *Zerbst,* 295 U.S. 490 (1935), and concluded as follows (M.R. 49-50):

> "No appeal, or a petition for writ of habeas corpus, will be successful in this court where the question is

whether the probationer was accorded his constitutional due process rights at the hearing. He simply has none."

B. *Walkling* v. *Rhay*:

On October 11, 1962, petitioner Walkling was charged by information filed in the Superior Court of the State of Washington for Thurston County, in Cause No. C-2941, with having committed the crime of burglary in the second degree on or about September 19, 1962 (W.R. 11). On October 29, 1962, the petitioner was brought before the Superior Court for Thurston County for arraignment upon the information, at which time he was accompanied by an attorney, W. N. Beal (W.R. 13). The petitioner thereupon entered a plea of quilty to the crime charged in the information (W.R. 13). The court entered an Order deferring the imposition of sentence for a period of three years from October 29, 1962, and granted the petitioner probation under the supervision of the Board of Prison Terms and Paroles and, as a condition of such deferral, required petitioner to serve 90 days in jail and make restitution (W.R. 14).

On May 2, 1963, on the basis of the report that petitioner Walkling had violated the terms of his probation, the Thurston County Superior Court ordered the issuance of a bench warrant for his apprehension (W.R. 8).

On February 24, 1964, petitioner was arrested by the Sheriff of Lewis County, Washington, and an information was thereafter filed in Lewis County charging the petitioner with forgery in the first degree and grand larceny (W.R. 8).

On April 16, 1964, before further proceedings were had in Lewis County, the petitioner was transferred to Thurston County pursuant to the May 2, 1963, bench warrant (W.R. 8).

On May 12, 1964, petitioner Walkling was brought before the Thurston County Superior Court for hearing on the petition of the Prosecuting Attorney for an Order revoking probation. Petitioner then requested a continuance in order to secure the services of an attorney, and the matter was continued to May 18, 1964, at 9:00 A.M. (W.R. 15).

On May 18, 1964, at 9:00 A.M., the matter was again called for hearing, at which time petitioner Walkling was present in court without an attorney (W.R. 15). Petitioner advised the court that an attorney named Smith Troy was supposed to represent him (W.R. 15). The court held the matter in abeyance until 9:15 A.M., but proceeded then because no one had appeared for the petitioner (W.R. 15). The petitioner therefore appeared without counsel (W.R. 15), although he repeatedly requested the assistance of counsel (W.R. 2). The trial court judge, Raymond Clifford, now deceased, took the position in all such cases that there was no constitutional right to the appointment of counsel in probation revocation proceedings or during the sentencing which follows, and it was not Judge Clifford's practice to advise unrepresented defendants of a right to appointed counsel in such proceedings (W.R. 17-18). (The court below assumed for purposes of decision that petitioner was not advised of a right to the appointment of counsel at public expense (W.R. 19).)

The petition to revoke probation was read to the petitioner in open court, and a certified copy was served upon

him. Clare Murray, a probation parole officer, was sworn and testified in regard to the fourteen separate counts of forgery and the fourteen separate counts of grand larceny filed against the petitioner subsequent to October 29, 1962. The court concluded that the order granting deferral of sentence and probation should be revoked, whereupon an order was so entered, and petitioner Walkling was sentenced to a term of confinement of not more than fifteen years upon his previous plea of guilty to the crime of burglary in the second degree (W.R. 15-16).

In June, 1966, petitioner filed a petition for writ of habeas corpus (W.R. 1-3) with the Washington State Supreme Court, alleging that the judgment and sentence of May 18, 1964, was void because he had not been represented by counsel during the probation revocation hearing, nor at the time of sentencing, despite his request for appointment of counsel. The petition for writ of habeas corpus specifically relied upon the Sixth and Fourteenth Amendments to the Constitution of the United States.

When the case was submitted to the court below, the briefs and oral argument were directed to the continued validity of the *Mempa* v. *Rhay* decision, which is the companion case herein. On October 18, 1966, the court below denied the application for habeas corpus, and stated (W.R. 20):

> "The application of WILLIAM EARL WALKLING for writ of habeas corpus is controlled by this court's recent decision in *Mempa* v. *Rhay,* 68 W.D.2d 871 and his constitutional rights were not violated on the grounds alleged for the reasons assigned in the decision by this court in *Mempa* v. *Rhay, supra.*"

On May 17, 1967 petitioner Walkling was released from the Washington State Penitentiary at Walla Walla. He is now in the "custody" of and subject to the supervision of the Washington State Board of Prison Terms and Paroles. Pursuant to stipulation of counsel, a motion has been filed herein for substitution as respondent of the Washington State Board of Prison Terms and Paroles. See, e.g., *Jones* v. *Cunningham*, 371 U.S. 236 (1963).

Summary of Argument

Completely disregarding the thrust of the Fourteenth Amendment as enunciated in cases like *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), and *Douglas* v. *California*, 372 U.S. 353 (1963), the Washington State Supreme Court held that probationers do not have a right to counsel at revocation hearings, nor at the sentencing which follows, notwithstanding the threatened deprivation of their liberty and the imposition of a criminal judgment and sentence.

I.

A probation revocation proceeding is a critically significant stage in the proceeding against an accused, *White* v. *Maryland*, 373 U.S. 59 (1963), and the right to counsel in such a proceeding must be co-extensive with the basic right to counsel expressed in *Gideon* v. *Wainwright, supra.*

Characterization of a proceeding which may result in the deprivation of liberty as "quasi-administrative" or "civil" is insufficient to avoid the thrust of the Fourteenth Amendment. *Kent* v. *United States*, 383 U.S. 541 (1966); *In re Gault*, —— U.S. —— (May 15, 1967, 35 Law Week 4399); *Smith* v. *Bennett*, 365 U.S. 708 (1961). While the initial

granting of probation may be a "privilege" or a "favor," revocation of probation cannot be arbitrary, and must comply with due process of law. Cf. *Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957).

In the state of Washington, probation can only be revoked "for cause." A probationer who satisfactorily completes the terms of his probation can move to have his record cleared and civil liberties restored. His continued liberty is at stake when a probation revocation proceeding is convened. He has a need to be heard, and due process of law entitles him to counsel. *Powell* v. *Alabama,* 287 U.S. 45 (1932), and *In re Gault, supra.*

Only an attorney can effectively marshal the evidence, cross examine the opposing witnesses, and prepare a defense for the accused probationer. Only an attorney can effectively determine whether or not the accused's actions constitute sufficient cause for revocation, and only an attorney can adequately present matters in mitigation. Certain procedural rights are lost if not availed of during the probation revocation hearing, and only an attorney can be expected to advance these. Due process affords the right to counsel at such proceedings. *White* v. *Maryland, supra; In re Gault, supra.* Denial of counsel at such hearings is as unfair as denial was at trial, prior to *Gideon* v. *Wainwright, supra.*

The Equal Protection Clause of the Fourteenth Amendment also requires recognition of the right to counsel at probation revocation hearings. In the State of Washington, probation revocation hearings are held in open court, and the probationer has an opportunity to be heard. Retained counsel are permitted to appear. To condition

representation by counsel upon the probationer's affluence is an unconstitutional discrimination. *Douglas* v. *California, supra.*

II.

The lower court held that there is no right to counsel when, following revocation of probation, sentence is first imposed on the original criminal conviction. This also conflicts with the Due Process and Equal Protection clauses of the Fourteenth Amendment.

Townsend v. *Burke,* 334 U.S. 736 (1948), *Gideon* v. *Wainwright, supra,* and *Moore* v. *Michigan,* 355 U.S. 155 (1957), dictate that the right to counsel at sentencing, whether immediately following conviction or following a period of probation, is and must be co-extensive with the right to counsel at trial. The sentencing stage of the proceeding is as critical as the trial, and the assistance of counsel is constitutionally required. For example, motions to withdraw pleas of guilty can be made at this stage, matters in mitigation of sentence can be presented, objections can be made to illegal sentencing, and appeal rights may be involved.

In terms of equal protection, permitting the presence of retained counsel at sentencing while making the indigent fend for himself is an unconstitutional discrimination. *Douglas* v. *California, supra.*

III.

While neither petitioner specifically requested the appointment of counsel, this did not amount to a waiver, as the right to counsel does not depend upon a request. *Carn-*

ley v. *Cochran,* 369 U.S. 506 (1962). The lower court's theory that waiver might have occurred because probation was accepted on the basis of existing law is, in addition to being novel, patently insufficient to deprive this court of jurisdiction. *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449 (1958).

The petitioners were denied their constitutional right to counsel at the probation revocation hearings and sentencings, in violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment. The cases should be reversed and remanded in accordance with the opinion of this court.

Argument

Completely disregarding the thrust of the Fourteenth Amendment as enunciated in cases like *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), and *Douglas* v. *California,* 372 U.S. 353 (1963), and with an anachronistic reliance upon the ancient concepts of "right-privilege" and "the chancellor's grace," the Washington Supreme Court held that the petitioners did not have a constitutional right to counsel when they were peremptorily hailed into a judicial hearing at which the stakes included their liberty, reputation, future record, appellate remedies and when, for the first time, sentence was to be imposed upon a criminal charge. The lower court reached its decision notwithstanding the fact that the proceedings against the petitioners were as critically significant in a constitutional sense as the proceedings involved in *White* v. *Maryland,* 373 U.S. 59 (1963), and *Hamilton* v. *Alabama,* 368 U.S. 52 (1961).

Recent decisions of this Court established the right to counsel at various stages of the proceedings against an ac-

cused. See, e.g., *Gideon* v. *Wainwright, supra; Douglas* v. *California, supra; Escobedo* v. *Illinois,* 378 U.S. 478 (1964); *Miranda* v. *Arizona,* 384 U.S. 436 (1966); *Kent* v. *United States,* 383 U.S. 541 (1966), and *In re Gault,* —— U.S. —— (May 15, 1967, 35 Law Week 4399). Unfortunately, one gap remains—the area Professor Sanford A. Kadish has labelled "Peno-Correctional" in his article, *The Advocate and the Expert-Counsel in the Peno-Correctional Process,* 45 Minn. L. Rev. 803 (1961) (hereinafter cited "Kadish, *supra*"). The present cases clearly present the issue of one's right to counsel during a single phase of the "peno-correctional" gap—proceedings occurring after conviction, following a trial or plea of guilty, and before but including the time judgment and sentence are entered (as distinguished from post-conviction proceedings such as parole). We submit that the Due Process and Equal Protection clauses of the Fourteenth Amendment, as construed by this Court, confer a right to counsel at probation revocation proceedings and at the sentencing which follows, and that counsel must be appointed for indigents.

I.

The Fourteenth Amendment Confers a Right to Counsel During Probation Revocation Proceedings.

In dealing with the right to counsel under the Fourteenth Amendment to the United States Constitution, both the Due Process and Equal Protection clauses afford individually sufficient grounds for granting the relief sought by petitioners. For the Court's convenience, the following argument deals separately with each clause.

A. Due Process of Law Affords a Right to Counsel During Probation Revocation Proceedings.

Our position can be briefly stated: The right to counsel at probation revocation proceedings is, and must be, co-extensive with the right to counsel as established in *Gideon* v. *Wainwright,* 372 U.S. 335 (1963). The following statement from *Gideon* v. *Wainwright* is just as relevant to probation revocation hearings as to criminal trials (372 U.S., at 344):

> "[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crimes, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries . . . . From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if

the poor man charged with crime has to face his accusers without a lawyer to assist him."

The Washington State Supreme Court attempted to avoid the thrust of *Gideon* by characterizing probation revocation hearings as essentially "quasi-administrative" in nature, stating that "the operations are essentially no different from those performed administratively by the State Board of Prison Terms and Paroles or by prison authorities in administering other phases of penal administration in the State of Washington (M.R. 48)." The Court said probation status "is a matter of grace or privilege to be granted solely in the discretion of the courts," and "there are no constitutional rights respecting the acquisition of probation status (M.R. 47)."

Implicit in the approach taken by the Washington court is the notion that probation revocation proceedings are not "criminal prosecutions" within the Sixth and Fourteenth Amendments. This is also the essence of the respondent's argument. Since such proceedings are not "criminal prosecutions," it is argued, there is no right to counsel at such hearings (nor any other due process rights so far as the court below is concerned—M.R. 49-50). This approach, in addition to simply being wrong, is an example of misplaced and illogical reliance on labels.

A state court's characterization of a proceeding as "civil," "criminal" or even "quasi-administrative" is not sufficient to avoid the thrust of the Fourteenth Amendment. *Kent* v. *United States*, 383 U.S. 541 (1966), and *In re Gault*, —— U.S. —— (May 15, 1967), clearly rejected the "civil" v. "criminal" test in juvenile court cases presenting right to

counsel issues, and, as stated in *Smith* v. *Bennett,* 365 U.S. 708, 712 (1961), which dealt with a habeas corpus filing fee:

> "We shall not quibble as to whether in this context it be called a civil or criminal action . . . . The availability of a procedure to regain liberty lost through criminal processes cannot be made contingent upon the choice of labels."

In any event, we submit that the proceedings against the petitioners were clearly criminal in nature. Obviously, no one is arguing that they were civil proceedings. The purpose of the hearing, held in open court with a prosecutor and a judge, was to pass on the petitioners' continued eligibility for freedom—should they be sent to jail or not, and what should be their sentence for "joy-riding" and larceny, respectively. What could be more clearly "criminal"?

Turning then to the next basis for the decision below, one can acknowledge that the original order granting probation may have been a "privilege," a "favor" or an exercise of the "chancellor's grace," but it does not follow that no rights surround its revocation. Cf. *Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957) (admission to the Bar); *Slochower* v. *Board of Education,* 350 U.S. 551 (1956) (public employment). Professor Kadish has forcefully met this "common justification for the ostracism of the law and the lawyer":

> "While the argument is repeatedly made, generally in supporting a denial of legal processes against constitutional attack, it is hard to believe that anyone really believes it. First of all, even if it is solely

> the quality of mercy which is being dispensed, it is apparent that it is not a personal act of grace by a reigning monarch, but a highly institutionalized system administered to tens of thousands of offenders each year by hundreds of governmental officials. So administered in a democratic community, even grace itself . . . must be dispensed and withdrawn according to some sense of principle and order and with some respect for the forms of procedural regularity associated with concepts of basic fairness. But more significantly [parole and probation], . . . are not remotely charity, but an integral part of our system of criminal law . . . . and as such can hardly be viewed as being properly administered outside the framework of the legal order appropriate to other laws." Kadish, *supra*, at 826-27.

Regardless of the label placed on the order granting probation, the fact remains that the recipient of a deferred sentence is ordinarily permitted to return to his community, his family and his job, subject only to behavioral restrictions and conditions arising out of his probationary status. As stated by the dissenting judge in the lower court, "In a very realistic sense he is free, for his personal liberty is but slightly restricted (M.R. 51)."

In the State of Washington, probationary status may be revoked only if the court finds that the probationer is "violating the terms of his probation, or engaging in criminal practices, or is abandoned to improper associates, or living a vicious life." RCW 9.95.220. In other words, for "cause." Furthermore, the probationer is accorded the right, after a successful probationary period, to come be-

fore the court and petition for a negation of his conviction and dismissal of the charges. RCW 9.95.240. He may thus clear his record and remove outstanding penalties and civil disabilities. These are substantial and fundamental *rights*, and, as stated by the dissenting opinion below, "should not be subject to nullification by the whim of peremptory 'quasi-administrative' proceedings which do not even afford the right to be represented by counsel at the time of entering the nullifying judgment and sentence (M.R. 52)."

Of primary significance, a probation revocation hearing is convened, among other things, to pass upon the question of the probationer's continued *liberty*. As stated in Note, *Legal Aspects of Probation Revocation,* 59 Colum. L. Rev. 311, 325-26 (1959):

> "[T]he freedom of action which a probationer enjoys prior to revocation is sufficiently extensive that it should be considered 'liberty' within the meaning of a due process clause, either by viewing the granting of probation as a restoration of a part of the liberty of which the offender had duly been deprived by his conviction and by then viewing the revocation of probation as a deprivation of his restored liberty, or by theorizing that the offender was deprived of only part of his liberty when his conviction resulted in his being put on probation and that incarceration upon revocation of probation represents a further deprivation of liberty."

Since a child is constitutionally entitled to counsel in a proceeding to determine if he is a "delinquent" and is to be "subjected to the loss of his liberty," *In re Gault, supra,* at

——, the adult probationer must also be entitled to counsel in a proceeding wherein his liberty is at stake.

A probation revocation hearing is obviously a time when a defendant wishes and needs to be heard, and when due process must protect his right to be heard. As stated by Mr. Justice Sutherland in *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932):

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . . He requires the guiding hand of counsel at every step in the proceedings against him."

Some have made the argument that an attorney is not "necessary" at probation revocation proceedings, that probation officers "lean over backwards" for the probationer, and that the judge and prosecutor amply protect a man who "has had enough 'breaks' already." Kamisar and Cooper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 Minn. L. Rev. 1, 100 (1963) (hereinafter cited "Kamisar, *supra*"). [A similar argument was advanced concerning juvenile court proceedings, and was rejected forcefully in *In re Gault, supra.*]

Is an attorney "necessary"? What can he do at the hearing? First of all, issues of fact may be involved. The probationer is usually in jail after the revocation proceeding is commenced. Only a lawyer can effectively marshal the evidence, cross-examine opposing witnesses, be they lay people or probation officers, and put together a defense.

If the alleged violation is admitted by the defendant, a determination must be made as to whether that particular occurrence, malfeasance or nonfeasance constitutes statutory "cause" for revoking probation. Has the state complied with its burden of proof? Has the accused engaged in proscribed conduct sufficiently serious to warrant revocation of probation? Assuming that issues of fact are resolved against the accused, and the court concludes that requisite "cause" exists for revocation of probation, the question still remains—should probation be revoked. An attorney is obviously better equipped than the accused to argue mitigating circumstances in an attempt to dissuade the judge from revoking probation. As stated by a district court judge:

> "After all, we provide an attorney for sentencing, even though there is no doubt about the man's guilt. So here, even if there is a violation, *the disposition is crucial.* There are many things I can do short of sending the probationer back to prison. I might feel that something less than commitment to prison is called for, that, for example, sending him to a work farm for a few months is sufficient under the circumstances. A lawyer, a spokesman, can be helpful in this connection." Kamisar, *supra,* at 101.

The basic need for counsel is well summarized by Professor Kadish:

> "[T]he determination to revoke and recommit because of conduct in violation of the conditions on which release was granted, involves, if not exclusively, then at least centrally, the fairly narrowly focused issue of what the conduct of the releasee actually was and

whether it constituted a violation of a stated condition, entitling the court or agency to consider whether revocation is thereby indicated. Given the character of the issue to be determined and the fact that the continued liberty of a person depends on the outcome, it is difficult to understand the view sometimes expressed that a lawyer has no proper business in these matters. The central task of ascertaining whether the prisoner has committed the acts alleged, and measuring the acts proven against a standard to which he was obliged to conform is precisely the business of the criminal trial itself where the right to the assistance of counsel has been recognized as one of the 'immutable principles of justice.' Indeed, in many contested revocation proceedings, the conduct charged actually constitutes the commission of a criminal act. No doubt it is simpler and faster for a court or a board to make the determination by whatever means seem to it sufficient to persuade—whether it be an informal talk with the parole officer or a brief interview with the prisoner or a written report by an investigator. But it would seem patently at war with the central concept of procedural justice to deny to a person with his liberty at stake the opportunity to hear and meet the specific charge against him with the benefit of counsel." Kadish, *supra*, at 833.

In the procedural vein, a probation revocation hearing is a point at which Washington probationers can still move to withdraw an original plea of guilty. RCW 10.40.175; *State* v. *Farmer*, 39 Wn.2d 675, 237 P.2d 734 (1951); *State* v. *Shannon*, 60 Wn.2d 883, 376 P.2d 646 (1962). Can we

really expect the unrepresented probationer to even guess that this motion can be made?

The right to counsel at a probation revocation hearing must not be conditioned upon the existence of a fact dispute, i.e., upon denial of the alleged violation by the probationer. The decision to admit or deny the violation is crucial, and requires the advice of counsel. Cf. *Miranda* v. *Arizona*, 384 U.S. 436 (1966). For example, the petitioner in *Mempa* v. *Rhay* denied the probation violation when he was first taken into custody (M.R. 26). But he admitted it when he appeared at the hearing without counsel (M.R. 25). Would he have surrendered—confessed—as quickly if he had had a lawyer? Perhaps, but perhaps not—the decision cannot be made intelligently without consulting an attorney.

We submit that a probation revocation hearing is a "critically important" phase in the overall criminal proceeding against an accused. As stated in *Kent* v. *United States*, 383 U.S. 541, 554 (1966):

> "There is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons."

In *Kent* v. *United States*, the Court referred to the "critically important" question of whether a child should be deprived of the special protection and provisions of the juvenile court act, and it brushed aside the issue of whether juvenile proceedings are civil or criminal in nature. See also *In re Gault*, —— U.S. —— (May 15, 1967). Probation revocation proceedings are as critical as the juvenile court proceedings in *Kent* v. *United States* and *In re Gault*, the preliminary hearing in *White* v. *Maryland*, 373 U.S. 59

(1963), and the arraignment in *Hamilton* v. *Alabama,* 368 U.S. 52 (1961).

A "red herring" must be disposed of. Throughout the lower court's opinion runs the fear that it is impossible to grant the procedural safeguards sought by the petitioners without defeating the purposes of the probation system. But in Washington, as will be pointed out later, it is common practice to admit the appearance in probation revocation proceedings of retained counsel. It cannot really be argued that assigned counsel—but not retained counsel—would impede the revocation proceedings or conflict with the goals of the system.

Unfortunately, most federal courts in this country have not recognized the right to counsel at probation revocation proceedings. Much of this can be traced to dicta used by Mr. Justice Cardozo in *Escoe* v. *Zerbst,* 295 U.S. 490, 492 (1935), to the effect that "probation or suspension of sentence comes as an act of grace to one convicted of a crime," and that the Constitution does not require notice or hearing on revocation of the "favor." And see *Burns* v. *United States,* 287 U.S. 216 (1932). The result in *Escoe* v. *Zerbst,* fortunately, was not as bad as it might seem, for the case goes on to hold that the federal probation statute requires:

> " . . . such notice and hearing as will 'enable an accused probationer to explain away the accusation.' While this does not require 'a trial in any strict or formal sense,' it does require 'an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper.' [295 U.S., at 492]" Kadish, *supra,* at 815.

That case, moreover, did not involve the issue of the appointment of counsel, and it preceded *Gideon* v. *Wainwright, supra.*

The federal court approach in this area is typified by *Brown* v. *Warden*, 351 F.2d 564 (7th Cir. 1965), and the cases cited therein.[3] But the right to counsel during a probation revocation hearing was recognized in *United States ex rel. Harton* v. *Wilkins*, 342 F.2d 529 (2nd Cir. 1965), although the decision was based primarily upon Pennsylvania law. State courts go both ways, with many refusing to recognize the right, while others do recognize it. Kadish, *supra*, at 816; Note, *Legal Aspects of Probation Revocation*, 59 Colum. L. Rev. 311, 328-330 (1959). And see *Commonwealth ex rel. Remeriez* v. *Maroney*, 415 Pa. 534, 204 A.2d 450 (1964) (hearing to revoke probation and impose sentence is a "critical stage" in the proceedings and right to counsel exists, citing *Gideon* v. *Wainwright, supra*, and *White* v. *Maryland, supra*); and *Hoffman* v. *Alaska*, 404 P.2d 644 (1965) (denial of counsel to an indigent probationer violates the Equal Protection Clause of the Fourteenth Amendment, citing *Griffith* v. *Illinois*, 351 U.S. 12 (1956)).[4]

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[3] Many of the federal cases deal with probation *after* the imposition of sentence, and are therefore distinguishable from this case. See, e.g., *Brown* v. *Warden, supra.*

[4] A survey was taken of trial court judges in the six largest Washington State counties (Cowlitz, King, Kitsap, Kittitas, Spokane and Yakima). Most of the judges responded that they do not appoint counsel for probation revocation hearings, "however, some of those who do not appoint counsel have some qualms about the fact that they have not done so." Amandes and Stevens, *The Defense of Indigent Persons Accused of Crime in Washington—A Survey*, 40 Wash. L. Rev. 78, 85 (1965).

We submit that it is manifestly as unfair to deny counsel at probation revocation hearings as it was, prior to *Gideon* v. *Wainwright,* to deny counsel at the actual criminal trial. Mr. Justice Black's statement in *Johnson* v. *Zerbst,* 304 U.S. 458, 462-63 (1938) is as applicable to probation revocation hearings as to a trial on the merits:

> "[The conclusion that an unrepresented defendant cannot adequately advocate his right rests upon] the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is represented by experienced and learned counsel."

In summary, we submit that the due process concepts enunciated by this court in *Gideon* v. *Wainwright, supra,* and *In re Gault, supra,* are dispositive of these cases. The probation revocation hearing "must measure up to the essentials of due process and fair treatment," *In re Gault, supra,* at ——, thereby requiring recognition of the right to counsel:

> "Under our constitution, the condition of being a . . . [probationer] does not justify a kangaroo court." *In re Gault, supra,* at ——.

B. The Equal Protection Clause of the Fourteenth Amendment Requires the Appointment of Counsel for Indigent Probationers.

The Washington statutes dealing with probation and probation revocation, i.e., RCW 9.95.200 through RCW 9.95.240, do not expressly provide that probationers may use retained counsel during revocation hearings. Likewise, the

decisions of the Washington Supreme Court are devoid of such a requirement. The fact remains, however, as the respondent will undoubtedly admit, that virtually all Superior Court Judges within the State of Washington permit the appearance of retained counsel in such hearings, and no case has come to our attention in which a Superior Court Judge ordered retained counsel out of the room. As stated by Judge Hamilton, dissenting, in the court below:

> "As a practical and realistic matter, those probationers who can afford counsel will be afforded the opportunity of having counsel at their side throughout the proceeding. It would, indeed, be the rare Superior Court Judge who would deny them such a privilege." (M.R. 57)

We also wish to call the Court's attention to the affidavit of Harold R. Koch (W.R. 17-18). Mr. Koch was the Deputy Prosecuting Attorney who appeared against petitioner Walkling when his probation revocation hearing was convened. Mr. Koch's affidavit points out that Raymond W. Clifford, the Judge before whom that matter was called, had a practice in all probation revocation proceedings of refusing to appoint counsel, although he did permit the appearance of retained counsel for those who could afford them, and he was always willing to grant reasonable continuances for the benefit of retained counsel.

Although RCW 9.95.220 provides that probation may be revoked "without notice," the statute also provides that a probationer who is arrested and charged with violating the terms of his probation shall be "brought before the court

wherein the probation was granted." A judicial hearing is consequently required.

As to whether or not the probationer shall be given an opportunity to speak in such hearings, this language in the opinion of the court below settles the issue (M.R. 49):

> "In all fairness to the probationer—and consonant with regular and orderly court procedure—we would anticipate that probationers should and will be given an opportunity to present their side of the story to the court respecting reported violations of the terms or conditions of probation."

In light of the foregoing, we believe it can be said that the general practice in the State of Washington is to allow the appearance of retained counsel at probation revocation hearings. The probationer will be brought into court upon the alleged violation, he will be given an opportunity to be heard, and, if sufficiently affluent, he may be represented by retained counsel. But the indigent probationer must fend for himself. The clash with the Equal Protection Clause of the Fourteenth Amendment is obvious. To *paraphrase* this Court's language in *Douglas* v. *California,* 372 U.S. 353, 355-58 (1963):

> There can be no equal justice where the kind of revocation hearing a probationer receives depends on the amount of money he has; if the probationer with sufficient funds can make the court listen to argument by counsel, the poor probationer must not be forced to shift for himself. The practice in Washington manifests the policy that a probationer facing revocation be given an opportunity to be heard. But the indigent, where the fact situation is unclear or the errors are

hidden, has only the right to a meaningless ritual, while the rich man has a meaningful hearing.

See Kamisar, *supra*, at 96. See also *Griffin* v. *Illinois*, 351 U.S. 12 (1956), and *Baxstrom* v. *Herold*, 383 U.S. 107 (1966).

The decision of the court below has obviously created discrimination between probationers who can afford counsel and those who cannot. As stated by the dissenting opinion below (M.R. 57): "Due process and equal protection prohibit the accident of economic ability from being a criterion for right to counsel."

II.

The Fourteenth Amendment Confers a Right to Counsel at the Sentencing Stage of Every Criminal Prosecution.

The court below has made the surprising pronouncement that a defendant does not have a federal constitutional right to be represented by counsel when, following a plea of guilty and the revocation of probation, he for the first time is sentenced on the criminal charge. (The lower court's opinion applies equally to those situations where probation follows a contested trial rather than a plea of guilty.) That ruling departs from prior decisions of this Court and from most decisions within the United States. The sentencing which follows the revocation of probation represents the imposition of judgment and sentence on the original criminal charge, and, we submit, is as much a part of the criminal prosecution against the accused as the original trial, and the sentencing which usually occurs shortly after conviction. As such, this stage of the proceeding against the accused is clearly a part of the "criminal prosecution" referred to in

the Sixth Amendment, which is made obligatory upon the states by the Fourteenth Amendment to the Constitution of the United States.

A. Due Process of Law Affords a Right to Counsel During the Sentencing Stage of All Criminal Prosecutions, Including the Sentencing Which Follows Revocation of Probation.

Although this Court has not squarely passed on whether the right to counsel in the federal or state courts under the Sixth and Fourteenth Amendments, respectively, extends to the sentencing stage, thereby obliging the appointment of counsel for indigents, "it has on several occasions recognized the 'invaluable aid' that a lawyer can render at this stage in calling the court's attention to mitigating circumstances which might result in a lighter penalty." Kadish, *supra*, at 807. See, e.g., *Von Moltke* v. *Gillies*, 332 U.S. 708, 721 (1948); *Carter* v. *Illinois*, 329 U.S. 173, 178-79 (1946).

Perhaps the most significant and relevant decision of this Court on the issue of the right to counsel at sentencing is *Townsend* v. *Burke*, 334 U.S. 736 (1948). In that case, the petitioner pleaded guilty to non-capital offenses, and subsequently he asserted a violation of due process in the acceptance of his plea and the imposition of sentence without being advised of his right to counsel. This Court noted elements of substantial prejudice which the presence of counsel would have prevented. Accordingly, a due process violation was found. The significant aspect of *Townsend* v. *Burke* is that the test employed in assessing the petitioner's constitutional claim was substantially similar to the test this Court used in assessing right to counsel claims under *Betts* v. *Brady*, 316 U.S. 455 (1942). But *Gideon* v.

Wainwright, supra, overruled *Betts* v. *Brady.* In *Townsend* v. *Burke, supra,* the Court appears to have equated the right to counsel at the sentencing stage with the right at the trial itself. Accordingly, *Gideon* v. *Wainwright, supra,* renders lack of counsel at the sentencing stage as *conclusively* "prejudicial" or "unfair" as lack of counsel at the trial. See, Kadish, *supra,* at 806; and Kamisar, *supra,* at 100.

Equally significant is *Moore* v. *Michigan,* 355 U.S. 155 (1957), where this court referred to a right to counsel during the stage of criminal proceedings to determine the degree of murder, and said, at 355 U.S. 160:

> "The right to counsel is not a right confined to representation during the trial on the merits."

Even if the Court feels that *Townsend* v. *Burke, Gideon* v. *Wainwright* and *Moore* v. *Michigan* do not settle the issue, overwhelming reasons dictate why this Court should clearly rule that sentencing is a "critical stage" of a criminal prosecution, creating rights to counsel as extensive as those required at trial under *Gideon* v. *Wainwright, supra.* It is easy to demonstrate that sentencing in Washington is indeed as "critical" a function as the trial itself. For example, a motion to withdraw a plea of guilty can be made any time before judgment and sentence are entered. RCW 10.40.175; *State* v. *Shannon,* 60 Wn.2d 883, 376 P.2d 646 (1962); *State* v. *Farmer,* 39 Wn.2d 675, 237 P.2d 734 (1951). The motion is addressed to the discretion of the trial judge, and it must not be denied where it is evident that the ends of justice will be served by permitting entry of a plea of not guilty. *State* v. *McDowall,* 197 Wash. 323, 85 P.2d 660 (1938); *State* v. *Rose,* 42 Wn.2d 509, 256 P.2d 493 (1953). This is the stage at which matters in mitigation of sentence

can be presented, and objections raised to illegal sentences. Furthermore, where sentencing is deferred and a defendant is placed upon probation, a final judgment has not been entered, and an appeal may not be taken until probation is revoked and sentence imposed. *State* v. *Farmer, supra.*[5] While few issues are available on appeal following a plea of guilty, the rule announced by the court below applies equally to the situation in which probation is granted following a trial. A probationer being sentenced needs advice concerning his appeal rights as much as he would if he were sentenced immediately following conviction or a plea of guilty.

The vital need for a lawyer at this critical stage of a criminal proceeding was well summarized by Judge Russell in *Martin* v. *U.S.*, 182 F.2d 225, 227 (5th Cir. 1950):

> "There is then a real need for counsel . . . . Then is the opportunity afforded for presentation to the Court of facts in extenuation of the offense, or in explanation of the defendant's conduct; to correct any errors or mistakes in reports of the defendants' past record; and, in short, to appeal to the equity of the Court in its administration and enforcement of penal laws. Any Judge with trial Court experience must acknowledge that such disclosures frequently result in mitigation, or even suspension, of penalty."

Sentencing judges operate in a large area of discretion and doubt. This augments the need for counsel. *Carter* v.

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[5] This rule was recently modified. An appeal is now permitted following a *contested* trial even though sentencing is deferred and probation is granted. However, this is permissible only if probation is conditioned upon a fine or serving time in jail, and review is limited to claimed trial error. *State* v. *Proctor*, 68 Wn.2d 817, 415 P.2d 634 (1966).

Illinois, 329 U.S. 173, 178 (1946). The court is no longer focusing its attention on *past* behavior. Now, society, through the court, turns its attention to considerations of retribution, community reassurance, reformation and deterrence—areas in which the average judge needs and welcomes assistance. One cannot deny the vital need for counsel at this stage, nor the unfairness of not permitting the defendant to effectively participate in these weighty decisions. See *Kamisar, supra*, at 101; and Kadish, *supra*, at 830.

The lower federal courts' interpretation of the right to counsel at sentencing has not been consistent. See, e.g., Kadish, *supra*, at 808-809 fn. 15-20. The issue was squarely presented, and decided in favor of the right to counsel, in *Stidham* v. *Swope*, 82 F. Supp. 931 (N.D. Calif. 1949). Language in other federal decisions seems to indicate that a constitutional violation would be found were the issues squarely presented. See, e.g., *Gadsden* v. *U.S.*, 223 F.2d 627 (D.C. Cir. 1955), and *Walton* v. *U.S.*, 202 F.2d 18 (D.C. Cir. 1953).

Recognition of the right to counsel at sentencing in the state courts has been less even. But, of course, most of the state decisions were rendered against a backdrop of pre-*Gideon* v. *Wainwright* reliance on tests established under *Betts* v. *Brady*, *supra*. See, e.g., Kadish, *supra*, at 809-812. As Professor Kadish's discussion points out, however, most of the courts *started* from the premise that the right to counsel at sentencing is co-extensive with the right to counsel at trial. This Court should so state.

B. The Equal Protection Clause of the Fourteenth Amendment Requires the Appointment of Counsel for Indigents at the Sentencing Stage.

Our previous equal protection argument concerning probation revocation is equally applicable here. Furthermore, on page 21 of the brief which the respondent submitted to the court below in connection with petitioner Walkling (unprinted portion of Walkling record, p. 26), it is stated: "It is clear that a defendant of means can have counsel beside him at . . . [sentencing]." To condition the right to counsel at this critical stage of the criminal proceeding upon the defendant's affluence is discrimination, and denies the indigent defendant equal protection of the law. *Douglas* v. *California*, 372 U.S. 353 (1963); *Griffin* v. *Illinois*, 351 U.S. 12 (1956).

III.

The Petitioners Did Not Waive Their Right to Counsel.

The record does not conclusively show that either petitioner specifically requested representation by or appointment of counsel during his revocation hearing or at the time of sentencing. But as stated in *Carnley* v. *Cochran*, 369 U.S. 506, 513 (1962), "[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." See *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Furthermore, petitioner Mempa was then seventeen years old (M.R. 13), and his limited education and background mitigated against a knowledge waiver. See *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). Finally, the opinion and order of the court below in *Mempa* v. *Rhay* and *Walkling* v. *Rhay*, re-

spectively, deal only with the merits, and say nothing about waiver from the failure to request counsel.

The court below does seem to indicate in its *Mempa* v. *Rhay* opinion (M.R. 48) that waiver might have occurred because petitioner Mempa pleaded guilty and accepted probationary status on the basis of the existing statutes, which, the court said, do not confer a right to counsel.[6] This novel waiver theory is patently insufficient to deprive this Court of jurisdiction. Cf. *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449 (1958); and *Fay* v. *Noia,* 372 U.S. 391 (1963). As stated by Judge Hamilton, dissenting, in the court below (M.R. 58):

> "Aside from the fact that it is extremely doubtful that any such theory of waiver was fully explained to petitioner at the time of the entry of the order of deferred sentence, the harshness and rigidity of the position taken by the majority is but emphasized by the facts appearing in this case. . . . [The dissent discusses Petitioner Mempa's age and background.] Against this background, even the attorney general expresses some doubt as to petitioner's ability to fully comprehend the nature of his situation at the time of the revocation hearing. And, under the circumstances, it would be somewhat of a strain, to say the least, to assume that he fully appreciated all ramifications of the order of

[6] The court below was saying so in *Mempa* v. *Rhay* for the first time as to the sentencing stage of the proceedings. *McClintock* v. *Rhay,* 52 Wn.2d 615, 328 P.2d 369 (1958), held sentencing to be part of a criminal proceeding, requiring the appointment of counsel. The *McClintock* case, which preceded petitioner's plea of guilty, was overruled in *Mempa* (M.R. 47). In fact, the trial court ignored *McClintock* in imposing sentence without appointing counsel.

deferred sentence and at the time of entry of that order knowingly, intelligently and competently waived all constitutional rights with respect to subsequent proceedings. *Johnson* v. *Zerbst*, 304 U.S. 458 . . . (1938)."

Conclusion

For the reasons stated, it is respectfully submitted that the lower court erred, and that the petitioners were denied their right to counsel at the probation revocation hearings and sentencings, in violation of the provisions of the Fourteenth Amendment to the United States Constitution. The cases should be reversed and remanded, for further proceedings in accordance with the opinion of the Court, and issuance of the writs of habeas corpus.

Respectfully submitted,

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